

March 1 2010

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

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(Attorneys for Appellants, Christine Carrier,  
 Melissa Reavis and Toni Couch)

FILED

MAR 01 2010

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA  
 Supreme Court Cause No. \_\_\_\_\_

PA10-0095

IN THE MATTER OF THE  
 ESTATE OF

SUE FORD BOVEY,

Deceased.

NOTICE OF APPEAL

NOTICE is hereby given that Christine Carrier, Melissa Reavis and Toni Couch, the Appellants, who are the Petitioners in that cause of action filed in the Eighth Judicial District, in and for the County of Cascade, as Cause No. CDP-88-215, hereby appeal to the Supreme Court of the State of Montana from the *Order Re Motions for Summary Judgment* filed on February 2, 2010.

**THE APPELLANTS FURTHER CERTIFY:**

1. That this appeal is subject to the mediation process required by M.R.App.P. 7. If subject to mediation, the money judgment being sought is not less than \$5,000.

2. That this appeal is an appeal from an order certified as final under M.R.Civ. P.54(b). If this is such an appeal, a true copy of the District Court's certification order is attached hereto as Exhibit "A."

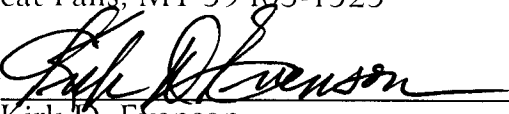
1           3.       That there is no challenge to the constitutionality of any act of the  
2 Montana Legislature.

3           4.       That all available transcripts of the proceedings in this case have been  
4 ordered from the court reporter contemporaneously with the filing of this notice of  
5 appeal.

6           5.       That included herewith is the filing fee prescribed by statute.

7       DATED this 26 day of February, 2010.

8                               MARRA, SEXE, EVENSON & BELL, P.C.  
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12                           By   
13                              Kirk D. Evenson  
14                              Attorneys for Appellants


15   **CERTIFICATE OF MAILING**

16       I hereby certify that I have filed a true and accurate copy of the foregoing  
17 NOTICE OF APPEAL with the Clerk of the Montana Supreme Court; and that I  
18 have served true and accurate copies of the foregoing NOTICE OF APPEAL upon the  
19 Clerk of the District Court, each attorney of record, and each party not represented  
20 by an attorney in the above-referenced District Court as follows:

21       Gregory J. Hatley  
22       James A. Donahue  
23       Davis, Hatley, Haffeman & Tighe, P.C.  
24       P.O. Box 2103  
25       Great Falls, MT 59403-2103

26       Ruth Reeves  
27       Clerk of District Court  
28       Cascade County  
      415 Second Avenue North  
      Great Falls, Montana 59401

      Hon. Kenneth R. Neill  
      District Court Judge  
      415 Second Avenue North  
      Great Falls, MT 59401

  
      Donna Osterman

1  
2  
3  
4 MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY  
5

6 IN THE MATTER OF THE ESTATE OF ) No. CDP-88-215  
7 SUE FORD BOVEY, ) ORDER RE MOTIONS FOR  
8 Deceased. ) SUMMARY JUDGMENT  
9

10 This matter comes before the Court on Respondents' Motion for Summary Judgment,  
11 Motion for Summary Judgment re: Laches and Estoppel and Motion re Limit on Petitioners  
12 Recovery (if any); and on Petitioner's Motion for Summary Judgment.

13 **FACTUAL AND PROCEDURAL BACKGROUND**

14 The Respondents in this matter are Thomas Couch, Patsy Allen, Connie Sisko, Judy  
15 Bistodeau, Robert Ford Faegre, Shirley Page Faegre and Mary W. F. Putnam. They will  
16 sometimes be referred to as the Couch/Faegre claimants. They are first cousins once removed  
17 from the testator Sue Ford Bovey. The Petitioners, Christine Carrier, Melissa Reavis and Toni  
18 Couch are daughters of Terry Couch, deceased, sibling of Thomas Couch, Patsy Allen, Connie  
19 Sisko and Judy Bistodeau.  
20

21 Terry died in 1982. Sue Ford Bovey's *Will* was executed on September 13, 1984. Sue  
22 died on October 7, 1988. Her son, Ford, survived her. On October 13, 1988, an *Application for*  
23 *Informal Probate of Will and Appointment of Personal Representative* was filed in this Court.  
24 Norwest Capital Management and Trust Company was appointed as Personal Representative.  
25 On May 22, 1991, this Court entered its formal *Order Settling First and Final Account of*  
26 *Personal Representative, Order Determining Testacy, Order Determining Heirs and Decree of*  
27



1 *Distribution of a Testate Estate.*<sup>1</sup> The estate was closed on June 17, 1991.

2 The residuary clause of Sue's *Will* reads as follows:

3 "I give, devise and bequeath all of the rest, residue and remainder of  
4 my estate, real, personal or mixed and wheresoever situated, to my  
5 trustee hereinafter named, to hold, manage, invest and reinvest  
6 and to collect the income and to pay the income to my son, Ford,  
7 not less often than quarter-annually during his lifetime. I grant to  
8 my trustee, hereinafter named, the right to invade the principal of  
9 this trust, in my trustee's sole discretion, if, in the exercise of that  
10 discretion my trustee determines that it is in the best interests of  
11 my son, Ford, to make an invasion of principal for the purpose of  
12 providing whatever funds are needed to provide reasonable support  
13 for my son, Ford.

14 Upon the death of my son, Ford, this trust shall terminate and all of the then  
15 remaining accrued and unpaid income and all of the then remaining principal  
16 of this trust shall be distributed, outright, and free of trust, in equal shares, to my  
17 then living heirs-at-law."

18 Norwest Capital Management and Trust Company was the trustee per the above *Decree of*  
19 *Distribution*.

20 Ford Bovey died on December 12, 1999. Some of the Couch/Faegre claimants filed a  
21 *Petition for Order Reopening Estate of Sue Ford Bovey* on February 10, 2000 in this Court for  
22 the purpose of, *inter alia*, "disposition of the estate."

23 On March 6, 2000, Norwest Bank, N.A., Investment Management (Norwest), successor  
24 to Norwest Capital Management and Trust Company, filed a separate action in the Fourth  
25 Judicial District Court, Missoula, County. In Cause No. DV-00-152, Norwest asked the Court to  
26 determine the heir or heirs of Sue Ford Bovey who were entitled to the trust residue. Its caption  
27 was *In the Matter of Sue Ford Bovey Testamentary Trust*. The Couch/Faegre claimants appeared  
28 in that action as well as Lisa Bovey, Ford's adopted daughter.

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29 1. An estate may be opened informally and closed formally pursuant to  
30 Section 72-3-1003 M.C.A. Thus this became a formal testacy proceeding as of  
31 that date.

1 After filing the petition in Missoula, Norwest's counsel filed an affidavit for service by  
2 publication on April 5, 2000. In this affidavit, counsel stated that Norwest has engaged the  
3 services of Montana ProcessServ, a licensed process server, to search for heirs. Norwest  
4 published the notification in *The Missoulian*. At hearing August 22, 2000, the Missoula Court  
5 ordered the default of all non-appearing parties.  
6

7 On September 26, 2000, this Court denied Norwest and Lisa Bovey's motion to dismiss  
8 the petition filed in this Court.

9 On November 6, 2000, the Missoula Court granted the Couch/Faegre claimants' motion  
10 for change of venue to Cascade County and consolidation of the Missoula County case with the  
11 Cascade County probate case. This Court entered its order consolidating the cases under the  
12 above number on March 30, 2001.  
13

14 The Couch/Faegre claimants and Lisa Bovey asserted competing claims to the residue.  
15 This Court held a trial on February 17 through 20 and 23 through 24, 2004 to determine Sue's  
16 intent regarding the distribution of the residue of the trust. In its *Findings of Fact, Conclusions*  
17 *of Law and Decree* (the "Decree") issued on April 27, 2004, this Court found that it was Sue's  
18 intent that the Couch/Faegre claimants inherit the residue of the trust. Notice of Entry of  
19 Judgment was served May 3, 2004. This case was appealed to the Montana Supreme Court and  
20 affirmed in an opinion delivered on March 2, 2006.  
21

22 On June 8, 2006, this Court issued an *Order Authorizing and Directing Distribution of*  
23 *the Trust Assets* to the Couch/Faegre claimants.

24 The Petitioners filed their *Petition for Order for Redistribution of Property Improperly*  
25 *Distributed* on April 9, 2007. An amended petition was filed on April 16, 2007 (the "Petition").  
26 With this petition, the Petitioners ask the Court to redistribute the estate's assets on the grounds  
27  
28

1 that they are Sue's heirs-at-law as well and are entitled, each, to 1/10<sup>th</sup> of the estate.

2 The Respondents filed a Motion to Dismiss the *Petition* which was denied by order  
3 entered January 23, 2008. Thereafter a Scheduling Order issued. The deadlines for discovery  
4 and motions have expired. The foregoing motions are pending with respect to said Petition.  
5

## 6 LEGAL ANALYSIS

### 7 I. Notice

8 The manner of giving notice of any petition in a probate case is governed by §72-1-301  
9 MCA. The 1999 version, essentially unchanged today, reads as follows:

10 **72-1-301. Notice-method and time of giving.** (1) If notice of a hearing on any  
11 petition is required and except for specific notice requirements as otherwise provided, the  
12 petitioner shall cause notice of the time and place of hearing of any petition to be given to  
any interested person. Notice shall be given:

13 (a) by mailing a copy thereof at least 14 days before the time set for the hearing  
by certified, registered, or ordinary first-class mail addressed to the person being notified  
14 at the post-office address given in his demand for notice, if any, or at his office or place  
of residence, if known;

15 (b) by delivering a copy thereof to the person being notified personally at least 14  
days before the time set for the hearing; or

16 (c) if the address or identity of any person is not known and cannot be ascertained  
17 with reasonable diligence, by publishing in a weekly paper once a week for 3 consecutive  
weeks and, if in a newspaper published more often than once a week, by publishing on at  
18 least 3 different days of publication, and it shall be so published that there must be at least  
10 days from the first to the last day of publication, both the first and last day being  
19 included.

20 (2) The Court for good cause shown may provide for a different method or time  
of giving notice of any hearing.

21 (3) Proof of the giving of notice shall be made on or before the hearing and filed  
in the proceeding.

22 As interested persons pursuant to §72-1-103 (25) MCA (1999) Petitioners' contend that  
23 they should have received notice of the hearing and did not. Further, they argue that they should  
24 have received actual notice of the proceedings.  
25

26 As seen, §72-1-301 MCA (1999) allows for notice to be given in one of three ways:  
27  
28

1 mailing a copy of the notice, personal delivery of a copy of the notice or through publication.  
2 The methods of service set forth in the statute are in the disjunctive, that is, only one of the  
3 service methods need be satisfied. In addition the statute does not specify the county or place  
4 that notice must be published.  
5

6 The most fundamental rule of statutory construction is that "the office of the Judge is  
7 simply to ascertain and declare what is in terms or substance contained therein, not to insert what  
8 has been omitted or to omit what has been inserted". Section 1-2-101 MCA (1999). Since the  
9 language of the statute is plain and unambiguous, the Court will not read into section 301 either  
10 the absolute requirement for actual notice or a directive as to the place of publication.  
11

12 Norwest filed its action in Missoula County. Norwest met all procedural requirements  
13 for notice by publication. Norwest placed its notice in the Missoulian as required by Rule 4  
14 Mont.R.Civ.P. and §72-1-301 MCA (1999). That county was proper since the probate code does  
15 not specify a county in which a party must publish notice of legal action. More important, it was  
16 the situs of the administration of the trust assets although it was later determined that Cascade  
17 County was the proper venue.<sup>2</sup> In fact, three additional claimants, Robert Ford Faegre, Shirley  
18 Page Faegre and Mary W. F. Putnam, responded after the notice in the Missoulian.  
19

20 That reasonable diligence was used to identify and locate heirs is conclusively established  
21 by the testimony of Dirk Williams, counsel for Norwest. He reviewed the family tree. He  
22 looked for specific heirs including Terry Couch and his wife, Joyce Couch. He caused inquiry to  
23 be made of the Cascade County Clerk of Court. He inquired of Norwest Trust. He conducted an  
24 internet search. He looked in Missoula and Great Falls area phone books. (See Petitioners' Brief  
25

---

26 2. Under the Trust Code, venue could have been laid in either Cascade or  
27 Missoula counties. For the reasons stated in this Court's Order of 9/26/00  
28 and adopted by the Missoula County Court in its Order of 11/6/00, venue was  
found to be in Cascade County.

1 in Support of Motion for Summary Judgment, pages 10, 11.)

2 Subsequent consolidation of the two cases into this Cascade County case did not nullify  
3 what had been done in Missoula County. The two cases involved exactly the same issue and  
4 obviously could not be litigated in both courts. All proceedings in Missoula County became part  
5 of the Cascade County case. As seen, the notice satisfied probate code requirements.  
6

7 Petitioners suggest that the Couch/Faegre claimants knew of the children of Terry Couch  
8 and, apparently, should have given them direct notice. However, it was Norwest, the Personal  
9 Representative and Trustee which was responsible for notice. It appears that Mr. Williams was  
10 not aware of them-he searched for their father and mother. The individual Respondents,  
11 however, merely protected their own respective interests by appearing the case. An heir does not  
12 have a duty to inform another heir of a death or probate proceeding. *Stevens vs. Torregano*, 192  
13 Cal. AP.2d, 105, 123 (1961). In any case, Petitioners Christine Carrier and Melissa Reavis  
14 received actual notice of their rights well before and during the litigation. (See discussion under  
15 Laches and Estoppel including discussion of Respondent, Toni Couch.)  
16

17 The Court concludes that due and proper notice had been given to Petitioners as of the  
18 date of entry of default, August 22, 2000.  
19

## 20 **II. Limitation of Action**

21 In addressing this issue in its *Order re: Respondent's Motion to Dismiss Petition*, this  
22 Court ruled that §72-3-317 MCA did not provide a time limit applicable to the filing of  
23 Petitioners' Petition. The Court then looked to §72-3-1013 (1) MCA which provides a limitation  
24 of up to one year after distribution of an estate and found that Petitioners met that deadline. In  
25 their *Motion for Summary Judgment*, among other arguments, Respondents invite the Court to  
26 reconsider that holding. The Court has done so and concludes that it overlooked the applicability  
27  
28

1 of §72-3-318 MCA.

2 Section 72-3-317 MCA provides in part:

3 **72-3-317. Effect of formal testacy order – modification or vacation – fact of**  
4 **death – remedies of alleged decedent.** Subject to appeal and subject to vacation as  
5 provided in 72-3-318 and this section, a formal testacy order under 72-3-313 through 72-  
6 3-316, including an order that the decedent left no valid will and determining heirs, is  
7 final as to all persons with respect to all issues concerning the decedent's estate that the  
8 court considered or might have considered incident to its rendition relevant to the  
9 question of whether the decedent left a valid will and to the determination of heirs, except  
10 that: ... (emphasis supplied)

11 The statute goes on to provide exceptions for a later-offered will or redetermination of  
12 heirs of an intestate estate under certain circumstances. Neither applies to this case. There is no  
13 later-offered will and this is not an intestate estate.

14 This, then, brings into play §72-3-318 MCA. This is clearly a broad statute setting the  
15 limitation for modifying or vacating all other orders in formal testacy proceedings. It reads in its  
16 entirety as follows:

17 **72-3-318. Modification or vacation for other cause.** For good cause shown, an  
18 order in a formal testacy proceeding may be modified or vacated within the time allowed  
19 for appeal.

20 The Decree is an order in a formal testacy proceeding. The time for appeal ran from  
21 service of the Notice of Entry of Judgment and had long expired before the Petition was filed.  
22 Notice of Entry is not required to be served on defaulted parties. *Estate of Holmes* (1979), 183  
23 Mont. 290; *Estate of Spencer* (2002), 313 Mont. 40.

24 Section 72-3-1013 MCA does not apply to this case. It provides:

25 **72-3-1013. Limitation on actions against distributees.** (1) Unless previously  
26 adjudicated in a formal testacy proceeding or in a proceeding settling the accounts of a  
27 personal representative or otherwise barred, the claim of any claimant to recover from a  
28 distributee who is liable to pay the claim and the right of any heir or devisee or of a  
successor personal representative acting in their behalf to recover property improperly  
distributed or the value thereof from any distributee is forever barred at the later of 3 years

1 after the decedent's death or 1 year after the time of distribution thereof. (emphasis  
2 supplied).

3 The Decree in this case was a final adjudication of the heirs entitled to distribution of the  
4 estate residue in a formal proceeding and therefore is excluded from this provision. Moreover,  
5 distribution was in accordance with the Decree. There was no "improper" distribution.

6 Pursuant to §72-3-318 MCA the time for filing of this Petition expired in June 2004 and  
7 was thereafter barred.

### 8 **III. Laches and Estoppel**

9 Laches is an equitable principle by which a court denies relief to a claimant who has  
10 unreasonably delayed or been negligent in asserting a claim. *Cole v. State ex rel. Brown*, 2002  
11 MT 32, 308 Mont. 265, 42 P.3d 760; *Anderson v. Stokes*, 2007 MT 166, ¶19, 338 Mont. 118,  
12 ¶19, 163 P.3d 1273, ¶19 (citing *Montanans for Justice v. State ex rel. McGrath*, 2006 MT 277,  
13 334 Mont. 237, 146 P.3d 759). The doctrine applies when the delay or negligence has prejudiced  
14 the party against whom relief is sought, and the asserted right has been delayed so long that to  
15 enforce it would be inequitable. *Helena Aerie No. 16, F.O.E. v. Mont. Dep't of Rev.* (1991), 251  
16 Mont. 77, 822 P.2d 1057; *In re Estate of Wallace* (1980), 186 Mont. 18, 606 P.2d 136.

17 The Montana Supreme Court has stated, "Laches exists where there has been an  
18 unexplainable delay of such duration or character as to render the enforcement of an asserted  
19 right inequitable, and is appropriate when a party is actually or presumptively aware of his rights  
20 but fails to act." *Murray v. Countryman Creek Ranch*, (1992), 254 Mont. 432, 436 (overruled on  
21 other grounds) (quoting *Larson v. Undem* (1990), 246 Mont. 336, 340 P.2d 1318). The purpose  
22 of the doctrine is to foreclose "stale" claims or those asserted after a protracted period of  
23 apparent assent. *Castillo v. Franks* (1984), 213 Mont. 232.

1 Equitable estoppel is similar in nature. This doctrine is based on the principle that a party  
2 cannot through his intentional conduct, action, language or silence induce another party to  
3 unknowingly and detrimentally alter his position. *Stanley L. & Carolyn M. Watkins Trust v.*  
4 *Lacosta*, 2004 MT 144, 321 Mont. 432, 92 P.3d 620.

5  
6 As testified to by Petitioner Christine Carrier, she became aware of Petitioners' potential  
7 entitlement to the Sue Ford Bovey estate back in 1989 as a result of a letter sent to their mother,  
8 Joyce Couch, (now known as Joyce Pritchett). This letter, dated April 16, 1989 (Exhibit 1 to her  
9 deposition) was from Newell Gough, one of the attorneys probating Sue's estate, seeking to  
10 identify potential contingent beneficiaries. She saw and discussed this letter with her mother.  
11 (Carrier deposition, pages 24, 25).

12  
13 The same is also true of Petitioner Melissa Reavis (Carrier deposition, pages 30-32;  
14 Reavis deposition, pages 27, 28).

15  
16 At the same time they were both aware of the fact that the estate was quite large and the  
17 termination and distribution of the estate would not occur until after Sue's son Ford had passed  
18 away (Carrier deposition, pages 32, 33).

19  
20 It was also established that Carrier was aware of Ford's death in early 2000 (Carrier  
21 deposition, pages 36-37) and Reavis at least by 2004 (Reavis deposition, page 32).

22  
23 Moreover, Petitioners Reavis and Carrier obtained actual knowledge of the litigation  
24 involving Respondents' claims to the Sue Ford Bovey Estate in 2003 and 2004 based upon  
25 articles published in the Great Falls Tribune (Carrier deposition, pages 37, 38, 41, 42 and Reavis  
26 deposition, page 46). This wasn't just ordinary coverage. It included front page in depth  
27 reporting with pictures and graphics. See *Great Falls Tribune, July 20, 2003*. These extensive  
28 Tribune articles are Exhibits 7-11 to the depositions and ran from July 20, 2003 through April

1 28, 2004. Reavis also testified that although she was aware of her potential claim to Sue's estate  
2 and ongoing litigation she never brought it up to Respondents (specifically Patsy Allen)  
3 "throughout the years probably from 1990..." (Reavis deposition, pages 39, 40).  
4

5 To summarize the timeline set forth in more detail above, Sue died in 1988; the estate  
6 was probated 1988 to 1991; Carrier and Reavis were on notice of their potential claims as early  
7 as 1989; Ford died in 1999; the probate was reopened and the trust proceeding commenced in  
8 2000; notice and default occurred and the estate litigation essentially began in 2000; extensive  
9 publicity concerning the matter occurred in 2003 and 2004; judgment was entered in 2004; the  
10 case was appealed and the Supreme Court opinion rendered in 2006; distribution was authorized  
11 and occurred in June 2006. Only after all that did Petitioners make their first appearance in this  
12 case April 16, 2007.  
13

14 In the meantime Respondents responded to notice and appeared in the case in 2000.  
15 They hired attorneys. The files and records in this case reflect a long and tortured history of  
16 pleadings, motions and hearings. The Respondents endured this process. It is safe to conclude  
17 they assisted their attorneys. Some testified. Petitioners were involved in none of this but now  
18 demand three tenths (3/10's) of the estate. Petitioners shared no part of the expense and  
19 inconvenience of the prior proceedings. Respondents, however, did. The Court cannot disregard  
20 the fact that Respondents alone bore the burdens of the prior litigation, even while Petitioners  
21 Carrier and Reavis were aware it was taking place. To require the Respondents to disgorge part  
22 of the inheritance well after distribution would be inequitable and inherently prejudicial.  
23

24 By reason of the foregoing, the Court concludes that the claims of Carrier and Reavis are  
25 barred by these defenses.  
26

27 Finally, with respect to Petitioner Toni Couch, she may or may not have seen the Gough  
28

1 letter in 1989. (Carrier deposition, page 30). More important however, is the fact that she left  
2 the Great Falls area in the early 1990's, apparently moving to the west coast. She had no contact  
3 with her family after about 1993. Neither her mother nor her sisters knew how to get a hold of  
4 her until about 2006. (Carrier deposition, pages 27, 28). So while the defenses of laches and  
5 estoppel may not apply to her, there is an even stronger case for notice. Obviously, it could not  
6 be expected that Mr. Williams would have any way of locating her and publication was certainly  
7 appropriate.  
8

9 By reason of the foregoing,

10 IT IS HEREBY ORDERED that Respondents' Motion for Summary Judgment and  
11 Motion for Summary Judgment: Laches and Estoppel are **granted** and Petitioners' Motion for  
12 Summary Judgment is **denied**.  
13

14 IT IS FURTHER ORDERED that Respondents Motion Re Limit on Petitioners'  
15 Recovery (if any) is moot.

16 IT IS FURTHER ORDERED that the Amended Petition for Order for Redistribution of  
17 Property Improperly Distributed is **denied** and **dismissed**.  
18

19 DATED this 2<sup>nd</sup> day of February, 2010.

20  
21   
DISTRICT COURT JUDGE

22 cc: ☒ Kirk Evenson  
23 Gregory J. Hatley  
24  
25  
26  
27  
28